COVINGTON & BURLING LLP

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202 662 6000
FAX 202 662 6291
WWW.COV COM

BEIJING
BRUSSELS
LONDON
NEW YORK
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
WASHINGTON

MICHAEL L. ROSENTHAL
TEL 202.662 5448
FAX 202.778.5448
MROSENTHAL @ COV.COM

JUL 19 2011
RECEIVED

July 19, 2011

230647

BY HAND

ENTERED
Office of Proceedings
JUL 20 2011
Part of
Public Record

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc. and BNSF Railway Company*

Dear Ms. Brown:

Enclosed for filing *under seal* are an original and ten copies of the HIGHLY CONFIDENTIAL version of Union Pacific's Reply to Arkansas Electric Cooperative Corporation's Motion Based on "Newly Discovered Evidence." In addition, we have separately enclosed for filing in the Board's *public docket* an original and ten copies of a REDACTED version of Union Pacific's Reply.

Additional paper copies of this filing are also enclosed. Please return date-stamped copies to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosures

cc: Parties of Record

230647

JUL 19 2011

RECEIVED

REDACTED – TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERGY ARKANSAS, INC. and ENTERGY SERVICES, INC., Complainants,	)	
v.	)	Docket No. 42104
UNION PACIFIC RAILROAD COMPANY and MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC. and BNSF RAILWAY COMPANY, Defendants.	)	

ENTERED
Office of Proceedings
JUL 20 2011
Part of
Public Record

UNION PACIFIC'S REPLY TO ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S MOTION BASED ON "NEWLY-DISCOVERED EVIDENCE"

J. MICHAEL HEMMER
GAYLA L. THAL
LOUISE A. RINN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-4831
Facsimile: (402) 544-0127

MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Union Pacific Railroad Company

July 19, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERGY ARKANSAS, INC. and ENTERGY SERVICES, INC., Complainants,	)	
v.	)	Docket No. 42104
UNION PACIFIC RAILROAD COMPANY and MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC. and BNSF RAILWAY COMPANY, Defendants.	)	

UNION PACIFIC'S REPLY TO ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S MOTION BASED ON "NEWLY-DISCOVERED EVIDENCE"

The Board should deny AECC's motion for leave to supplement its petition for reconsideration based on "newly-discovered evidence." The information that AECC claims is "new" – that UP and BNSF moved more Southern Powder River Basin ("SPRB") coal in 2005 and 2006 than in 2004 – was in the public domain long before this proceeding began.

AECC is also wrong to claim the Board was "misinformed" when it concluded that disruptions to UP's coal service in 2005-2006 "affected the shipping public generally" and "do not establish a showing of anticompetitive conduct on UP's part with respect to [Entergy's Independence plant]." March 2011 Decision at 11. The Board was entirely correct. Despite record deliveries, UP was unable to move enough coal to Entergy and other coal customers in 2005-2006 because demand grew faster than supply, which was impaired by weather-related service problems. Entergy's own expert witness recognized that service problems in the 2005-2006 period affected many coal plants besides the Independence plant. Moreover, UP showed that the Independence plant was not disadvantaged because it was served only by UP. In fact, UP showed that the Independence plant actually received *better* service during the 2005-2006 period than Entergy's White Bluff plant, which is served by UP and BNSF.

I. AECC'S "NEWLY-DISCOVERED EVIDENCE" IS NOT "NEW EVIDENCE."

AECC's motion is based on the allegedly "newly-discovered" fact that UP and BNSF increased SPRB coal deliveries in 2005 and 2006 over their 2004 baselines. AECC says that information was revealed for the first time in a verified statement that UP filed in Ex Parte No. 705 on May 27, 2011. However, information regarding UP's and BNSF's SPRB coal shipments in the 2004-2006 period was reasonably available to AECC long before May 27, 2011, and even before AECC filed its Opening Statement in this proceeding on April 7, 2010.

AECC could have found the information that it now claims is "newly-discovered evidence" in the pleadings in the prior round of this very case. UP's witness F.M. "Rick" Gough testified back in 2008 that "[f]rom 2004 through 2006, . . . UP-transported SPRB tons increased by roughly . . . 10 percent, to 194 million in 2006 versus the 177 million in 2004." Gough Initial Reply Verified Statement at 9 (Aug. 11, 2008) (Attached hereto as Exhibit A).[1]

UP's 2005 and 2006 Annual Reports, which UP filed publicly with the Securities and Exchange Commission and posted on its website shortly after the end of each of those years, also contain the information that AECC now claims is "newly-discovered evidence."[2] AECC did not even have to read beyond the first page of those reports:

- Page 1 of UP's 2005 Annual Report states that "[c]oal tonnage shipped out of the Southern Powder River Basin (SPRB) topped the 179 million ton mark. Despite setting a new record, SPRB Joint Line disruptions artificially constrained production." (Attached hereto as Exhibit B.)

---

[1] The same Verified Statement was *again* included in the record, as Attachment 1 to the Gough Verified Statement in UP's Reply filed June 4, 2010.

[2] *See* http://www.up.com/investors/annuals.

- Page 1 of UP's 2006 Annual Report states that UP "shipped 194 million tons of coal from the Southern Powder River Basin, an 8 percent increase, to support growing electrical demand." (Attached hereto as Exhibit C.)

AECC also could have found similar information in a variety of other sources. UP issued a press release in January 2007 citing its shipment of 194 million tons of SPRB coal in 2006. (Attached hereto as Exhibit D.)[3] *Progressive Railroading* magazine discussed UP's 2006 SPRB coal shipments in a January 2007 article, "UP sets annual coal tonnage record in Southern Powder River Basin." (Attached hereto as Exhibit E.)[4] Indeed, the very first result produced by a simple "Google" search for "Powder River Basin coal shipments" is a Wikipedia entry regarding the Powder River Basin, which states:

> In 2006, Union Pacific set a record by hauling 194 million tons of coal – an 8 percent increase compared with 2005 tonnage.[5]

Information regarding BNSF's SPRB shipments in 2005 and 2006 was equally available to AECC. BNSF's website includes coal service updates that contain precisely the same data that AECC claims is "new." BNSF's January 4, 2007 update reports that BNSF delivered an "annual record" of 287.2 million tons of coal in 2006, up 10.8 percent from the previous annual record of 259.2 million tons in 2005. (Attached hereto as Exhibit F.)[6]

---

[3] *See also* http://www.uprr.com/newsinfo/releases/service/2007/0115_coal.shtml.

[4] *See also* http://www.progressiverailroading.com/news/article.asp?id=3068.

[5] Archived versions of the Wikipedia website show that this entry was included prior to April 7, 2010 – the date AECC filed its Opening Statement in this proceeding. For the archived version of the website from April 2, 2010, see Powder River Basin - Wikipedia, the free encyclopedia, http://en.wikipedia.org/w/index.php?title=Powder_River_Basin&oldid=353472573 (last visited July 5, 2011).

[6] *See also* http://domino.bnsf.com/website/updates.nsf/ee37a1758857335f86256b030057f78e/5076810dd261de5a86257259006364c1?OpenDocument.

Finally, BNSF and UP regularly presented data on SPRB tons shipped at meetings of the National Coal Transportation Association ("NCTA"). AECC is a member of the NCTA.[7] Even if AECC missed all of the meetings, it could have obtained the information from NCTA's website.[8] Two UP presentations to the NCTA that were made long before AECC filed its Opening Statement together include all of the information AECC now claims is "new" evidence.[9] (Relevant pages of the presentations are attached hereto as Exhibits G and H.)

But even if AECC had not come across information regarding UP's and BNSF's SPRB deliveries until UP's filing in Ex Parte No. 705, AECC's "discovery" still would not be grounds for the Board to reconsider its March 2011 Decision because that information was not "new evidence." "New evidence" is different from "newly-discovered evidence." "[T]he term 'new evidence' refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised." *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004). The Board does not grant reconsideration merely because a party happens to "find[] new information at a late stage in the process." *Id.* at 805.

Indeed, even if UP and BNSF had not made their SPRB delivery information public, AECC still would not be entitled to reconsideration because it could have obtained the information in discovery. Information about 2005-2006 deliveries plainly existed before the complaint in this proceeding was filed on February 19, 2008. Accordingly, it "was reasonably

---

[7] *See* http://www.nationalcoaltransportation.org/membership/members.html.

[8] *See* http://www.nationalcoaltransportation.org/events/wlp.html.

[9] *See* Presentation by Andy Schroder, Western Logistics and Planning Committee Meeting (Feb. 22, 2006), *available at* http://www.nationalcoaltransportation.org/events/UP_Presentation_2_22_06.pdf; Presentation by Andy Schroder, Western Logistics and Planning Committee Meeting (Feb. 20, 2008), *available at* http://www.nationalcoaltransportation.org/events/SchroderL&P2-20-08.pdf.

available to [AECC] before the agency's original decision," and thus, it "is not new evidence for purposes of seeking agency reconsideration." *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (STB served Feb. 13, 2007) at 5. As the Board has explained, "new evidence" must involve information that a party could not have obtained before the Board issued its original decision. "This limitation serves the important purpose of requiring parties before the Board to marshal all their available evidence and present all their arguments before the Board issues its decision, not after, thus avoiding (to the extent possible) unnecessarily protracted and piecemeal administrative adjudication." *Id.* In short, AECC is not entitled to reconsideration based on discoverable information that pre-dated the complaint.

II. AECC'S "NEWLY-DISCOVERED EVIDENCE" IS IRRELEVANT TO THE BOARD'S CONCLUSION THAT UP SERVICE PROBLEMS "AFFECTED THE SHIPPING PUBLIC GENERALLY" AND "DO NOT ESTABLISH A SHOWING OF ANTICOMPETITIVE CONDUCT ON UP'S PART."

AECC's claim that disruptions to SPRB service in the 2005-2006 period did not broadly affect SPRB shippers is simply preposterous. The disruptions triggered investigations, hearings, or written reports by several federal agencies, including the Department of Energy, the Federal Energy Regulatory Commission, the Energy Information Administration, and the Board.[10] Concerns about coal logistics and electric reliability also prompted Congressional

---

[10] *See* Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy, Deliveries of Coal from the Powder River Basin: Events and Trends 2005-2007 (Oct. 2007), *available at* http://www.oe.netl.doe.gov/docs/Final-Coal-Study_101507.pdf; *Discussions With Utility and Railroad Representatives on Market and Reliability Matters*, FERC Docket No. AD06-8-000 (June 15, 2006), *transcript available at* http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=11104162; *Issues in Focus: Coal Transportation Issues*, U.S. Energy Information Administration, AEO2007, http://www.eia.gov/oiaf/aeo/otheranalysis/ (continued…)

hearings from April through August 2006.[11] This was not a problem that was unique to the Independence plant.

Indeed, AECC's claim that the Independence plant was "singled out for poor service" borders on the delusional. AECC Motion at 4. Entergy's own expert recognized that the service disruptions experienced by Entergy were not unique and that Entergy had faired no worse than other utilities. In his testimony before the Arkansas Public Service Commission, Entergy's expert, Mr. Crowley, stated:

> Based on my extensive work with PRB coal shippers, I know that nearly all PRB supplied utilities also have been adversely affected by BNSF's and UP's poor service.... I am aware of 20 different utilities reporting problems similar to those experienced by [Entergy].

Mr. Crowley further testified that nearly all PRB supplied utilities were experiencing similar delivery shortfalls:

> As stated above, this is an industry wide problem. Of those utilities reporting delivery shortfalls, the amount of the shortfall appears to be similar across all of the utilities, i.e., like [Entergy], other utilities are receiving only 80 to 85 percent of their declared volumes.

UP cited this testimony in its reply evidence and attached it as an exhibit. *See* UP Reply at 34-35 & Counsel's Exhibit No. 5. A copy of the testimony is attached hereto as Exhibit I.

---

cti.html; *Rail Transportation of Resources Critical to the Nation's Energy Supply*, STB Ex Parte 672 (July 18, 2007); *see also Rail Transportation of Coal to Power Plants: Reliability Issues*, CRS Report for Congress, RL34186 (Sept. 26, 2007).

[11] The Senate Committee on Energy and Natural Resources held hearings focused on coal supplies on May 25, 2006. The Senate Commerce Committee, Subcommittee on Surface Transportation and Merchant Marine held a hearing on the economics, service, and capacity in the freight railroad industry on June 21, 2006. The House Transportation and Infrastructure Committee, Subcommittee on Railroads, held a hearing on railroad capacity on April 26, 2006. The House Committee on Resources, Subcommittee on Water and Power held a hearing on challenges facing western power generation facilities on August 9, 2006.

Moreover, UP's reply evidence demonstrated conclusively that UP did not engage in anticompetitive conduct by refusing to allow BNSF to deliver coal to the Independence plant in 2005-2006.

First, UP showed that Entergy never even asked UP to allow BNSF to deliver coal to the Independence plant, presumably because Entergy recognized that BNSF could not have provided better service than UP. *See* UP Reply at 40.

Second, UP showed that BNSF was suffering from its own service difficulties and was in no position to institute service to the Independence plant. *See id.* at 40-41.

Third, UP showed that Entergy actually received better service at the UP-served Independence plant than at its White Bluff plant, which was served by BNSF and UP. *See id.* at 41-42.[12]

Fourth, UP refuted Entergy's claim that UP deliberately allocated train slots to customers other than Entergy in order to maximize profits. *See id.* at 43 & n.35.[13]

---

[12] Entergy witness Crowley claimed in his rebuttal verified statement that UP's analysis was flawed because it used "transit times, not cycle times." Entergy Rebuttal, Crowley V.S. at 6. However, the documents underlying UP's analysis – Entergy's own service reports – use the terms interchangeably. *See* UP Reply Evidence, Counsel's Exhibit No. 9.

[13] AECC re-argues this point, claiming that UP had an incentive to pursue new business at higher rates rather than ship coal to the Independence plant. *See* AECC Motion at 5. UP has already responded to a similar claim by Entergy that UP disfavored the Independence plant. *See* Gough Verified Statement at 4. In particular, AECC forgets that UP actually embargoed new business (for which it could have received even higher rates according to AECC's own logic) during its service problems to focus resources on existing customers. *See id.*; *see also* March 2011 Decision at 10.

AECC apparently does not appreciate the irony of its claim that it needs access to an additional rail carrier at Independence because UP's rate to Independence was too "cheap." AECC Motion at 5.

The Board reviewed the evidence in the record and correctly concluded that it did "not establish a showing of anticompetitive conduct on UP's part with respect to Entergy." March 2011 Decision at 11.

AECC attempts to repackage these arguments by claiming that UP's SPRB shipment levels are inconsistent with the delivery shortfalls experienced at the Independence plant. However, AECC's claim is misleading because it ignores the increased demand for SPRB coal in the 2005-2006 period. That is, UP-served plants experienced shortfalls in the 2005-2006 period despite an overall increase in deliveries because the plants had increased their demand for coal faster than UP was able to increase its supply. Moreover, in 2005-2006, UP was obligated to transport coal not only to plants it served in 2004, but also to customers from whom it had recently won business from BNSF. That explains why UP delivered more SPRB coal in 2005 in total, but delivered less coal to Entergy than in 2004.

In fact, when AECC claims a 3 million ton shortfall in deliveries by UP, that figure relates to Entergy's demand in 2005 and 2006, not UP's actual deliveries in 2004. UP delivered { } million tons of coal to Independence in 2004, { } million tons in 2005, and { } million tons in 2006. Thus, UP's "shortfall" in the 2005-2006 period relative to 2004 deliveries was just { } tons, not "over 3 million tons," as AECC claims. AECC Motion at 3. Moreover, UP's deliveries to Independence increased by { } from 2005 to 2006, while UP's total SPRB deliveries increased by 8% – that is, Independence { }.

Other evidence confirms that the Independence plant { } during the 2005-2006 period. Specifically, in 2005, Independence received { } of NCTA target demand, while UP's overall customer average was {   }.[14] In 2006, Independence received {   } of NCTA target demand, while UP's overall customer average was {   }.

In sum, AECC's "newly-discovered evidence" is not new and does not undermine the Board's conclusions in its March 2011 Decision. The Board should reject AECC's attempt to repackage arguments that the Board rejected in its March 2011 Decision.

These issues have been litigated extensively in this proceeding.[15] By re-arguing them under the guise of "newly-discovered evidence," AECC is simply wasting everybody's time and resources. This is particularly ironic in light of AECC's prior complaints about "wasteful expenditures" associated with Board proceedings.[16]

---

[14] As previously explained:

> NCTA target refers to the process sponsored by the National Coal Transportation Association ("NCTA") for using customer demand to assign train slots for loading between rail carriers on the Joint Line. Shippers input the tons they demand by mine, by destination, and by rail carrier. Producers separately input the number of tons they will supply from each mine by customer and by destination. The settled amount is used to determine the slot allocation for loading trains. As Entergy's suppliers experienced difficulties that limited their production, this provides a more accurate benchmark of UP's performance.

Gough Initial Reply V.S. at 6 n.2 (attached as Exhibit A). NCTA targets are also the best metric for comparing deliveries among different customers.

[15] AECC has also pursued breach of contract claims against UP for failing to deliver sufficient volumes of coal in the 2005-2006 period. That case was resolved by a settlement.

[16] *See, e.g.*, Supplemental Comments of Arkansas Electric Cooperative Corporation at 10, *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Feb. 26, 2007) (expressing concern about "wasteful expenditures on litigation"); Petition of Arkansas Electric Cooperative Corporation for Reconsideration at 2, *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Oct. 12, 2007) (expressing concern about "economically unsound litigation that consumes more resources than it allocates").

Respectfully submitted,

MICHAEL L. ROSENTHAL
SPENCER F. WALTERS
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

J. MICHAEL HEMMER
GAYLA L. THAL
LOUISE A. RINN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-4831
Facsimile: (402) 544-0127

Attorneys for Union Pacific Railroad Company

July 19, 2011

CERTIFICATE OF SERVICE

I, Spencer F. Walters, certify that on this 19th day of July, 2011, I caused copies of Union Pacific's Reply to Arkansas Electric Cooperative Corporation's Motion Based on "Newly-Discovered Evidence" to be served by e-mail and first-class mail, postage-prepaid, on the following counsel for the parties of record:

C. Michael Loftus, Esq.
Frank J. Pergolizzi, Esq.
Andrew B. Kolesar III, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

Eric A. Von Salzen, Esq.
Alex Menendez, Esq.
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Washington, DC 20001

Adrian L. Steel, Jr., Esq.
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006-1101

Louis E. Gitomer, Esq.
The Adams Building, Suite 301
600 Baltimore Avenue
Towson, MD 21204-4022

Spencer F. Walters

Exhibit A

VERIFIED STATEMENT

OF

F. M. "RICK" GOUGH

My name is Rick Gough. I am Senior Business Director - Energy for Union Pacific Railroad Company ("UP"). I have been employed by UP for more than 29 years, and I have served as Senior Business Director - Energy since June 1, 2000. In my current role, I have primary responsibility for commercial aspects of relations with many of UP's customers that ship large quantities of coal from the Powder River Basin in Wyoming, including Entergy Arkansas, Inc., and Entergy Services, Inc. (collectively, "Entergy").

My direct dealings with Entergy date back to 1983, when UP, Western Railroad Properties, Inc., and Missouri Pacific Railroad Company first entered into long-term contracts to deliver PRB coal to Entergy, which was then named Arkansas Power & Light Company. As a result of my work, I am generally familiar with the 1992 UP/M&NA Lease, including the terms that affect M&NA's rights to handle unit-train coal traffic to Entergy's Independence plant.

This statement primarily responds to Entergy's claim that the existence of the UP/M&NA Lease's interchange commitment has been "a serious impediment to Entergy's ability to obtain all of the coal deliveries that have been needed at the Independence Station since the lease became effective in 1992." *See* Gray VS at 2. It also responds to Arkansas Electric Cooperative Corporation's claim that UP would use the interchange commitment unreasonably to prevent interline movements of coal from origins that it cannot serve, such as KCS-served mines in Oklahoma or Texas. *See* AECC Argument at 4. Finally, I address Entergy's more general claim that UP has not invested adequately in its coal business. *See* Mohl VS at 6-9.

As a general matter, Entergy and AECC are wrong to suggest that the UP/M&NA Lease has reduced their ability to obtain rail service to Independence. Entergy's Independence plant has been served exclusively by UP since it first began operating in 1983. Entergy's Independence plant is located on a former Missouri Pacific line that runs between western Missouri and northeastern Arkansas. Missouri Pacific was not a neutral carrier when M&NA leased the line that serves Independence. UP acquired control of Missouri Pacific in December 1982, long before the 1992 UP/M&NA Lease, and even before Entergy had begun commercial operations at Independence. The lease thus did not extinguish any competitive routing options that had been available to Entergy.

Entergy is also wrong when it claims that the UP/M&NA Lease has been an impediment to obtaining all of the coal deliveries Entergy has needed at Independence. Entergy describes three situations over the past fifteen years in which service disruptions have affected Entergy, but none of the those situations was caused by or exacerbated by the lease. In other words, Entergy would have been in the same position if UP had never leased its lines to M&NA. Moreover, contrary to Entergy's claims, UP has never refused a request by Entergy to waive the lease's interchange provisions when UP could not provide requested service to Independence. In fact, the lease's impacts on Entergy have been only positive. UP has worked with M&NA to improve its service to Independence by routing empty cars over the leased lines.

It is also worth noting at the outset of my statement that Entergy is careful not to complain that the UP/M&NA Lease has had any detrimental effect on rail rates to Independence. In fact, Entergy's rates have fallen since the lease. Entergy's net rates for PRB coal moving to Independence have fallen from approximately { } per net ton in 1992 to { } per net ton in 2007. Entergy's rates in 2008 {

}.[1]

The 1993-1995 Midwest Flooding And Aftermath

Entergy is wrong to the extent it implies that UP's service difficulties following severe Midwest flooding in 1993 were related to the UP/M&NA Lease. UP and Entergy have long disputed the precise cause of UP's service problems in the 1993-1995 period, and there is no reason to rehash those disputes here other than to state that Entergy never claims that the problems were caused by or exacerbated by the UP/M&NA Lease. Entergy never claims the problems would not have occurred, or that it would have been better able to receive coal at Independence during that period, if UP had never leased its lines to M&NA.

Entergy also is wrong when it claims that UP refused to waive the UP/M&NA Lease's interchange commitment to permit delivery of additional coal to Independence using a Burlington Northern/M&NA routing. Entergy's witness, Daniel B. Gray, says he asked UP to waive the interchange commitment in a letter dated May 17, 1994. *See* Gray VS at 6 & Exhibit DBG-3. Mr. Gray is correct as far as that letter goes, but either he does not know all the facts, or he simply fails to tell the full story.

As the parties' correspondence shows, UP responded to Entergy's concerns by proposing a plan for increasing its coal deliveries to Entergy's Independence and White Bluff plants. *See* Exhibit FMG-1. After reviewing UP's proposal, Entergy withdrew its request that

---

[1] *See* http://www.bls.gov/data/inflation_calculator.htm.

UP waive the interchange commitment. Specifically, Entergy's Roy A. Giangrosso wrote UP's Steve Jensen that Entergy was "pleased with the railroad's efforts" and was "withdrawing its request, stated in Dan Gray's letter of May 17, 1994, that the BN and M&NA be allowed to transport coal into ISES [Independence] from SPRB mines currently served by WRPI." *See* Exhibit FMG-2. To the best of my knowledge, Entergy never renewed its request.

The 1997-1998 Service Crisis

Entergy again is wrong when it claims that UP refused to waive the UP/M&NA Lease's interchange commitment to allow coal deliveries to Independence via a BNSF/M&NA routing during UP's service problems following the UP/SP merger. Mr. Gray bases his claim on an April 7, 1998 letter from Entergy's Charles W. Jewell, Jr., to UP's Art Peters. *See* Gray VS at 8 & Exhibit DBG-5. A review of the letter, however, demonstrates that Mr. Gray is mistaken. The letter shows that Entergy never asked UP to waive the lease's interchange commitment to allow a BNSF/M&NA routing to Independence. Instead, Entergy asked UP to waive restrictions on trackage rights BNSF obtained in the UP/SP merger so BNSF could "utilize these trackage rights to serve *White Bluff*." I have attached this correspondence to my statement as Exhibit FMG-3.

White Bluff is a different Entergy plant – one that is approximately 125 miles south of UP's connection with M&NA. M&NA does not serve White Bluff, and it would not have been involved in Entergy's proposal to allow a BNSF movement to White Bluff. Mr. Jewell's proposal was to have BNSF operate over UP's line from Pine Bluff, Arkansas, to Little Rock, Arkansas, and then to the plant. Thus, once again, Mr. Gray is wrong when he claims that UP refused to waive the interchange commitment to allow alternative service to Independence.

Moreover, the UP/M&NA Lease actually allowed UP to improve its service to Entergy during this service crisis. UP and M&NA developed and implemented a plan to route Entergy's empty cars from Independence to the PRB via Kansas City. This new routing proved beneficial and remains in place today. UP also took several other steps to increase the volume of coal being delivered to Independence and White Bluff, including acquiring additional rail cars and offering to grant relief from the minimum annual volume requirements in the parties' rail transportation contract to allow Entergy to take PRB coal deliveries by barge at White Bluff.

The 2005-2006 Service Problems

Entergy is wrong once more when it implies that a UP refusal to waive the UP/M&NA Lease's interchange commitment prevented PRB coal deliveries to Independence via an alternative BNSF/M&NA routing during UP's service problems in 2005-2006. Entergy never asked UP to waive the interchange commitment to allow service via a BNSF/M&NA routing. In fact, Entergy was unable to take advantage of UP's suggestion to use alternative BNSF service to White Bluff so that UP could increase its own deliveries to Independence. If BNSF could not provide additional service to White Bluff, where it already had access, it plainly was in no position to establish new BNSF/M&NA service to Independence.

During the disruption caused by the impairment of the Joint Line in 2005, I pointed out to Dan Gray that UP's declaration of force majeure relieved Entergy of its volume commitment to UP at White Bluff. More than once, I suggested to Mr. Gray the possibility of {

}. Increased BNSF moves to White Bluff would have allowed UP to divert train sets from White Bluff service to Independence service and would have increased the total amount of coal delivered to Entergy's two plants in Arkansas. Such alternative service appeared feasible because BNSF already had access to the White Bluff plant and there was an existing BNSF-Entergy agreement in place for White Bluff.

However, BNSF apparently was not in a position to provide additional service to White Bluff. In fact, the available data show that, during 2005-2006, UP was performing at a higher level relative to NCTA target demand[2] than BNSF at White Bluff, approximately { .} versus { }, and UP was performing at an even higher level at Independence – approximately { }.[3] If BNSF could not provide better service than UP to White Bluff, where it already had access, it plainly was in no position to institute new service to Independence. Suggestions that Entergy could have received more PRB coal at Independence during 2005 and 2006 but for the supposed barrier of the M&NA lease have no basis in reality.

Moreover, Entergy is wrong when it claims that UP's refusal to waive the lease's interchange commitment prevented it from addressing delivery shortfalls by moving foreign coal to Independence in late 2006. UP's service to Entergy was essentially back to normal by that

---

[2] NCTA target refers to the process sponsored by the National Coal Transportation Association ("NCTA") for using customer demand to assign trains slots for loading between rail carirers on the Joint Line. Shippers input the tons they demand by mine, by destination and by rail carrier. Producers separately input the number of tons they will supply from each mine by customer and by destination. The settled amount is used to determine the slot allocation for loading trains. As Entergy's suppliers experienced difficulties that limited their production, this provides a more accurate benchmark of UP's performance.

[3] As my workpapers show, I derived these percentages by starting with FERC data to determine total PRB tons delivered. The UP performance was calculated by dividing the volumes we moved by the amount the mines were prepared to load in UP trains for Entergy. Tons delivered by UP were subtracted from the FERC data to determine the BNSF tons delivered. To determine the amount the coal mines could load in BNSF trains for White Bluff, I turned to {

}. This method is conservative in estimating BNSF performance, as it assumés that Entergy did not increase its demand for BNSF trains after UP explained that Entergy was entitled to divert traffic to BNSF.

time. Despite the extended undercutting of the Joint Line and dramatic increase in demand by Entergy and other customers seeking to rebuild inventories, UP delivered approximately { } of Entergy's NCTA coal demand to Independence in 2006.

Mr. Gray describes a situation in which Entergy was considering moving a test shipment of foreign coal to Independence from a Canadian National-served terminal at Convent, Louisiana. I cannot comment on Mr. Gray's dealings with M&NA or other railroads, but I can comment on how this issue was addressed by UP.

Mr. Gray contacted me in late September 2006 about possible test moves of foreign coal. He did not tell me that the move was part of an effort to mitigate UP's service problems in 2005 and earlier in 2006. Instead, he told me that Entergy {

}. Mr. Gray told me that Entergy was currently contemplating moving a test shipment to Independence and that it was considering several different potential routing options, including CN/UP, CN/KCS/UP, and CN/KCS/M&NA. A few days later, UP received a request from M&NA to waive the lease's interchange commitment so M&NA could handle the test to Independence in a route that would not include UP.

UP was willing and able to handle the movement. Thus there was no reason to grant the waiver requested by M&NA. M&NA remained free under the lease to participate in the movement without UP – it could even do so without compensating UP for use of the leased lines if it would still interchange at least 95% of its traffic with UP – but I do not know if M&NA ever actually bid for the traffic.

UP worked diligently with Entergy to develop an acceptable rate and routing for the coal. Mr. Gray seems to imply otherwise by asserting that Entergy "unfortunately" did not move the test shipment until 2007, but UP did nothing to delay the process, and I always understood that Entergy's plan was to move the test shipment in 2007.

In short, UP has never turned down a request by Entergy to waive the UP/M&NA Lease's interchange provision when UP was unable to provide the requested service.

Arkansas Electric Cooperative Corporation

AECC is wrong when it argues that UP has used, or would use, the UP/M&NA Lease's interchange commitment to prevent Entergy from obtaining substitute coal from mines that UP cannot serve, such as KCS-served mines in Oklahoma or Texas. *See* AECC Argument at 4. To the best of my knowledge, Entergy has never approached UP with a request to move such substitute coal using a non-UP interchange with M&NA. Moreover, as I stated in response to similar claims by AECC and Entergy in my March 28, 2006 reply verified statement in Ex Parte No. 575, UP would waive the lease's interchange commitment if Entergy approached us with a feasible plan to source substitute coal for Independence using a non-UP connection with M&NA in a situation in which UP was unable to meet its service obligations and unable to offer a reasonable through route for the substitute coal. However, that situation has never arisen.

Future Service To Independence

I take exception to Entergy's claims that UP has been reluctant to invest in its coal business. *See* Mohl VS at 6-7. UP is strongly committed to the expansion and growth of its coal network. Since entering the Southern PRB market in 1984, UP set a series of annual coal tonnage records in 21 of the 23 following years. More recently, between 2000 and 2004, UP increased its SPRB coal tonnage transported roughly 23 percent, from 144 million to 177 million tons annually. From 2004 through 2006, including the period covered by Entergy's complaints about UP's recent force majeure claims, UP-transported SPRB tons increased by roughly another 10 percent, to 194 million in 2006 versus the 177 million in 2004.

The growth in UP coal traffic was the result of UP's business commitment to expand and sustain its coal network. Between 1997 and 2007, UP invested more than $8 billion in its Energy business, including approximately $1.3 billion in new capacity, $5.7 billion in track maintenance, and $1.1 billion in locomotives. Entergy has benefited substantially from this investment. For the period from 2000 through 2006, Entergy's 1,300-mile route, which represents approximately 4% of UP's 32,339 mile system, received { } of total coal-related capacity spending and { } of total infrastructure capacity spending.

I also take exception to Entergy's claim that it is pursuing a build-in because it has so little confidence in UP's ability to provide reliable service. *See* Mohl VS at 7-8. If Entergy is truly concerned about increasing its competitive options at Independence, a build-in seems to be an appropriate market-based response – as opposed to their effort in this proceeding to get something for nothing. However, I doubt that the build-in has anything to do with service concerns. Despite Joint Line constraints, UP delivered approximately { } of Entergy's NCTA demand to Independence in 2005 and { } in 2006. Moreover, despite dramatically increased demand, UP delivered more than { } of Entergy's NCTA demand in 2007, and more than { } of Entergy's NCTA demand through June 2008.

Entergy seeks to sow doubts about future UP reliability with its allegations that excessive force majeure declarations by UP have deprived it of service. Specifically, its witnesses claim that UP declared 27 force majeures which excused UP from serving Entergy for 487 days between April 2005 and April 2008. Entergy exaggerates the effect of force majeures.

In fact, UP continued to deliver Entergy's coal during this period. Entergy demonstrated its honest view of UP service when it recently chose to increase its use of UP's services {

}.

Entergy complains about the number of force majeures UP has declared, but even when a force majeure is in effect, the party declaring the force majeure must make all reasonable efforts to continue to meet its obligations under the contract. The force majeure provides relief only to the extent necessary. For most of the force majeure events, UP would have sought only to have the delays associated with the conditions excluded from the calculation of cycle time. Such adjustments would merely avoid or reduce the amount of deficit payment that UP would make. As a practical matter this is no different than when Entergy invokes an Unloading Disability to relieve itself of the obligation to pay UP a detention charge for its failure to unload a train within the time specified by the contract. Entergy claims numerous such disabilities. In both cases, the parties are exercising rights agreed to in their contract and not attempting to void the contract. Meanwhile, UP has every incentive to move as much coal as possible to Entergy since it only gets paid for the amount of coal it delivers.[4]

UP certainly continued to deliver as much coal as it reasonably could, even when it declared force majeures. In 2005 and 2006, UP delivered 21.3 million tons of coal to Entergy,

---

[4] Entergy also has overstated the effect of force majeure declarations in several ways. First, its claim that 45% of the days during that period were subject to force majeure appears to double-count days where more than one force majeure declaration was in effect. For example, while the Joint Line was being restored in 2005, severe flooding in Kansas in October 2005 damaged two bridges and washed out track in several locations. UP declared a force majeure for the Kansas flooding for both its Colorado and SPRB coal customers. It lifted that force majeure 26 days later when the last bridge repair was completed. There was also a derailment-related force majeue that was in effect for four days during the same month. Adding the duration of each force majeure would make it appear that there 61 force majeure days in October 2005. Second, Entergy appears to include declarations that effect only Colorado coal and not the vast majority of its coal moving from the PRB.

including 12.2 million tons to Independence. This was { } of the amount available to UP during those two years for loading on the Joint Line to Independence. UP delivered all of this coal despite such profound obstacles as the May 2005 impairment of the Joint Line, blizzards that closed highways and freezing temperatures that snapped rail in hundreds of locations. The reality is that UP has delivered { } of the coal available for Entergy since the Joint Line was restored.

In 2007, UP moved { } of the combined NCTA target for Entergy and slightly more than { } for Independence. We moved { } trains compared to the { } planned for Independence. In the first half of 2008, UP moved { } trains out of { } for Independence. UP met all of Entergy's coal demand even though Entergy increased its volume on UP by more than { } tons annually beginning January 1, 2007.

Entergy demonstrated its honest view of UP service when it chose to {

}. Obviously, I am not privy to the terms that BNSF offered for a new contract, but if Entergy were seriously concerned about UP's ability and willingness to move its coal it had the opportunity to continue shipping via an alternative route.

VERIFICATION

I declare under penalty of perjury that he foregoing statement is true and correct to the best of my knowledge, belief and information.

Executed on August 8, 2008.

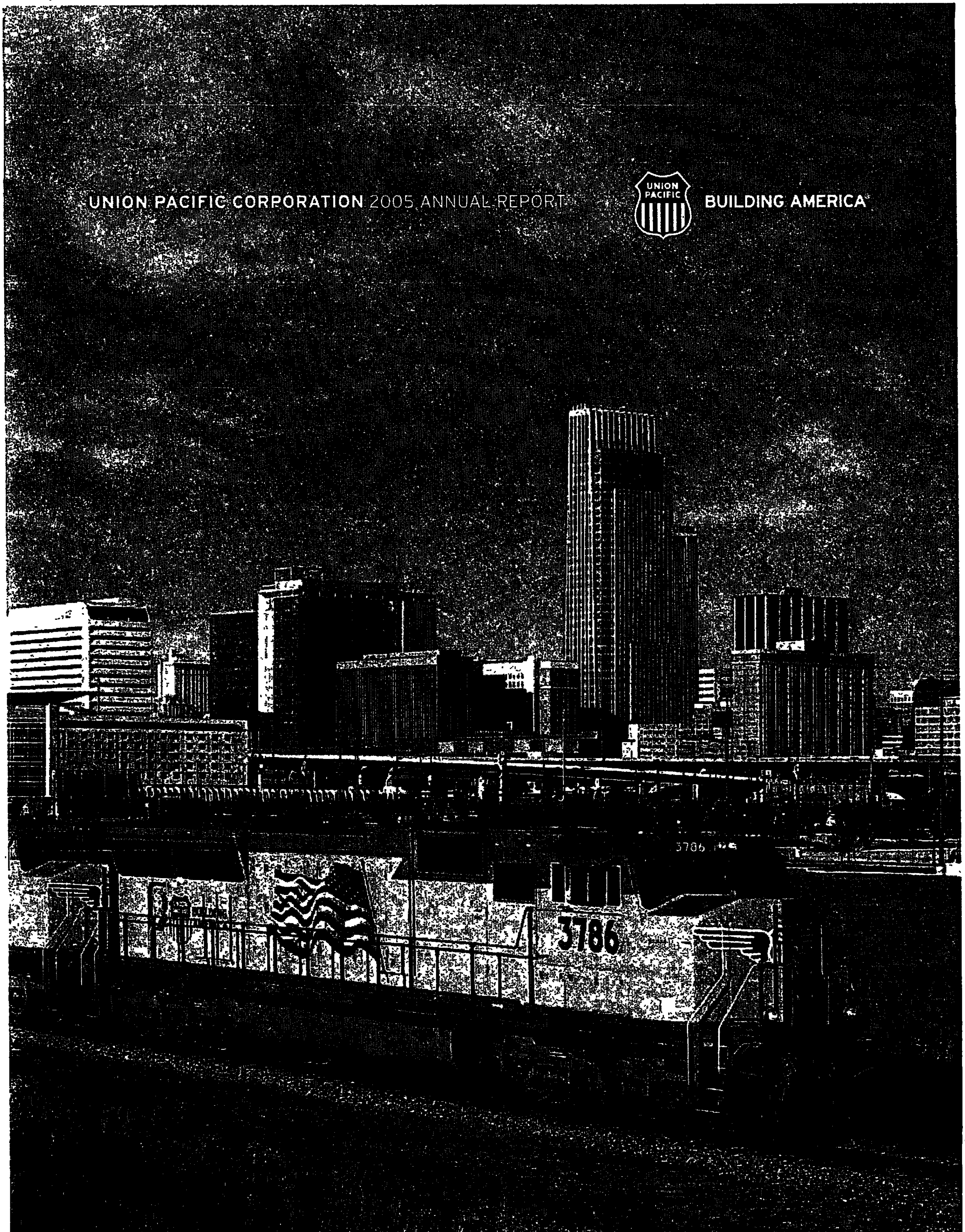
F. M. "Rick" Gough

Exhibit B

UNION PACIFIC CORPORATION 2005 ANNUAL REPORT

UNION PACIFIC

BUILDING AMERICA®



DEAR FELLOW SHAREHOLDERS:

The men and women of Union Pacific put forth an extraordinary effort in 2005, delivering solid results. Despite the unprecedented frequency and severity of major weather-related service disruptions, 2005 saw improved operating performance, record revenue, yield gains and improved financial results.

2005 RESULTS

Increasing operational efficiency was our key objective as we entered 2005. Progress toward that goal can be viewed in many ways, but by almost every measure, we did improve. Our network fluidity, in the form of lower terminal dwell times, improved 6 percent during 2005. The decline in average rail car inventories in 2005 and increased carloads also were indicators of greater operating efficiency.

We delivered improved financial performance this year against the backdrop of adverse weather and rising fuel prices. Demand for our services remained very strong and, as a result, we achieved several milestones:

- Commodity revenue grew 11 percent to a record $13 billion.
  - All six business groups attained "best ever" revenue levels.
  - Revenue for business moving into and out of Mexico totaled over $1.1 billion, a 15 percent increase versus 2004 and the first time Mexico revenue exceeded the $1 billion mark.
- Seven-day carloadings, a measure of our business strength, hit a record 198,416 carloads in the third week of November.
- Coal tonnage shipped out of the Southern Powder River Basin (SPRB) topped the 179 million ton mark. Despite setting a new record, SPRB Joint Line disruptions artificially constrained production.
- Operating income, excluding last year's asbestos charge, grew 16 percent and our fuel-adjusted operating ratio decreased by 1.5 points, both signs of improved operating efficiency.
- Net income grew 20 percent excluding the effects of the asbestos charge in 2004 and the tax reduction in 2005.
- Free cash flow after dividends totaled $234 million.
- UP's lease adjusted debt to capital measure improved 1.5 points to 43.6 percent, our strongest balance sheet since 1985.
- UP's stock price rose 20 percent to close at $80.51 per share for the year.

CHALLENGING OPERATING ENVIRONMENT

Although we improved in 2005, the tremendous weather challenges we faced hindered our progress. A series of devastating events, starting in January with the West Coast storm and continuing through the year with Hurricanes Katrina and Rita and the Kansas washouts, severely damaged our Railroad. Our employees and the communities where we operate were impacted as well.

Weather issues and an expanded repair program caused operational problems on the SPRB Joint Line in Wyoming for much of the year. The additional resources and network initiatives we established to drive service improvement became the catalyst for our recovery efforts. This greater network resiliency and the tireless dedication of our employees allowed us to quickly restore service following each natural disaster.

These external challenges resulted in lost opportunities during the year. Our focus for the future is to continue the transition to operational excellence, and our momentum is building. There's clearly a great deal of work ahead of us, but we believe we're well positioned to make further progress.

Exhibit C

UNION PACIFIC

UNION PACIFIC CORPORATION 2008 ANNUAL REPORT

Fellow Shareholders:

Union Pacific today is a company that is committed to improving safety, strengthening financial returns, increasing value to our customers, and providing critical benefits to the economy of our country and the communities where we operate. We achieved a number of milestones in 2006, highlighting the value of our franchise and the dedication of our employees.

Union Pacific's Growth Strategy

Our Company is growing. The records we set in 2006 created a platform to continue rewarding our shareholders in 2007 and beyond. Looking ahead, we see even greater growth opportunities. Customers need our investment in additional rail capacity so they can grow. We move the food, vehicles, plastics, coal, lumber and consumer goods that people use every day. Our communities are increasingly aware that UP's rail network strengthens their local economies and connects them to the rest of the world.

Our strategy is to enhance the long-term value of our company by serving the nation's growing need for quality transportation. We will achieve this strategy by providing valued service to our customers, improving the efficiency of our operations, leveraging our franchise diversity and making growth investments in corridors where we have a strategic advantage.

Strong 2006 Business Volumes Lead Record Year

Our 2006 business volumes started out strong, growing 4 percent in the first quarter. Seven-day carloadings, a measure of our business volume, topped the 200,000 mark for the first time ever in June. Our busiest months generally are August through October, so setting the carloading record in June was significant. With such an early surge in our business, the normal fall peak shipping season was expected to be even stronger. However, reduced housing starts, cuts in auto production and softness in the domestic intermodal market slowed the pace of our growth at year's end.

Total carloads in 2006 were a record 9.9 million, up 3 percent versus 2005. This growth helped each of our six business groups set revenue records for the second straight year. Our Energy, Intermodal and Automotive groups also set individual volume records:

- Coal-fired plants are the single largest generator of electricity in America today. We shipped 194 million tons of coal from the Southern Powder River Basin, an 8 percent increase, to support growing electrical demand.
- Intermodal volumes grew 6 percent, driven by double-digit growth in the movement of steamship containers carrying consumer goods that Americans need in their daily lives.
- UP's automotive shipments grew 5 percent to a record 834,000 carloads. With U.S. light vehicle sales declining 3 percent in the year, growth in automotive is a testament to the strength of UP's auto franchise.

We also experienced record growth in two emerging Agricultural markets. Ethanol and dried distiller grain soluables (DDGS), an ethanol co-product used for livestock feed, grew nearly 50 percent during 2006. In total, we moved more than 1.1 billion gallons of ethanol and 1.6 million tons of DDGS.

Exhibit D

Union Pacific Boosts SPRB Coal Shipments To Nation's Utilities During 2006 – Setting New One Year Record

The Nation's Largest Railroad Moves 15 Million Additional Tons of SPRB Coal in 2006

Omaha, Neb., January 15, 2007 – To help meet the nation's ongoing reliance on coal, Union Pacific moved 194 million tons of coal from Wyoming's Southern Powder River Basin (SPRB) during 2006 – a new record for the railroad.

Compared with 2005, Union Pacific moved an additional 895 trainloads of SPRB coal during the past year – an increase of 15 million tons of coal, or enough to generate a year's worth of electricity for nearly 2.5 million homes.

As train numbers increased during 2006, so did train size. UP trains transporting coal out of the SPRB averaged just over 15,000 tons each in the fourth quarter—an increase of 200 tons over last year's average. Investment in capacity improvements and new processes helped UP achieve the increased tonnage.

"Our employees are stepping up to the challenge to help meet our nation's crucial energy needs," said Jim Young, president and CEO. "Their ideas and dedication helped fuel the increases we experienced in 2006, and together we are continuing to develop new ways to handle rising demand."

Additional rail line improvements in Wyoming are expected to help boost capacity on the Joint Line owned by UP and BNSF. Future improvements – a fourth main line on Logan Hill and a third main line north of Reno Junction – coupled with the addition of 14 landing spots at the mines for trains, also are expected to increase Joint Line capacity.

According to data released late last year by the Energy Information Administration (EIA) of the U.S. Department of Energy, coal inventories at the nation's electric utilities were expected to end 2006 at their highest levels in four years. On Dec. 21, 2006, the EIA reported coal inventories at the nation's utilities stood at 125.6 million tons, up 27.9 percent over a year ago. In its Short-Term Energy Outlook released on Dec. 12, 2006, EIA said it expects inventory levels to rise again in 2007, reaching 138.9 million tons by the end of the year.

Also in December 2006, the North American Electric Reliability Council (NERC) reported that utilities have ample supplies of coal on hand for the winter season, and that NERC had removed the SPRB from its reliability watch list.

About Union Pacific

Union Pacific Corporation owns one of America's leading transportation companies. Its principal operating company, Union Pacific Railroad, links 23 states in the western two-thirds of the country and serves the fastest-growing U.S. population centers. Union Pacific's diversified business mix includes Agricultural Products, Automotive, Chemicals, Energy, Industrial Products and Intermodal. The railroad offers competitive long-haul routes from all major West Coast and Gulf Coast ports to eastern gateways. Union Pacific connects with Canada's rail systems and is the only railroad serving all six major gateways to Mexico, making it North America's premier rail franchise.

For further information, contact Gene Hinkle at (402) 514-9406.

Exhibit E

Click here to contact the *Progressive Railroading* editorial staff.

1/16/2007 Coal Traffic

UP sets annual coal tonnage record in Southern Powder River Basin

In 2006, Union Pacific Railroad hauled 194 million tons of coal from Wyoming□s Southern Powder River Basin (SPRB) □ a new annual record and 8 percent increase compared with 2005 tonnage.

The Class I increased train size in the region, too. In the fourth quarter, trains moving coal out of the SPRB averaged more than 15,000 tons, a 200-ton weight increase compared with fourth-quarter 2005□s average.

Now, in conjunction with BNSF Railway Co., UP is completing track improvements along the joint line to move even more coal from the SPRB in 2007. The railroads are building a fourth mainline on Logan Hill and a third mainline north of Reno Junction, and adding 14 train landing spots at various mines.

Exhibit F

ServiceAdvisory

Customer Updates are designed to inform BNSF customers of new developments or changes relating to BNSF products, services, tools, prices or facilities.

To: BNSF Coal Customers

01/04/2007

Weekly PRB Coal Update for January 4, 2007

BNSF Sets Coal Tonnage Records in December and 2006
BNSF loaded a monthly record total of 25.297 million tons of coal systemwide in December, breaking the previous record of 25.008 million tons set in October 2006. December loadings brought the total for 2006 to an annual record 287.2 million tons, up 10.8 percent from the previous annual record of 259.2 million tons set in 2005.

In the Powder River Basin (PRB), including Wyoming and Montana mines, BNSF loaded an average of 51.7 trains per day during December 2006, also a monthly record. Mine issues reduced December 2006 loadings by an average of 1.6 trains per day. In 2006 BNSF loaded a total daily average of 49.7 trains in the PRB, up 10.4 percent from the 45.0 average daily PRB coal train loadings in 2005.

Construction Projects Update
BNSF is deriving full operational benefits from six miles of new second main track between Bayard and Degraw, Nebraska, after installation of additional turnouts and signal work were completed December 19. The new second main track is increasing fluidity on one of BNSF's core coal routes southeast of the PRB.

Bridge work is under way for 39 miles of new third main track between Donkey Creek and Reno, Wyoming. Grading will follow, with track-laying scheduled to begin in March. Completion of this trackage this summer will provide three main tracks from Shawnee Junction at the south end of the PRB Joint Line to Caballo Mine at the north end of the Joint Line and beyond to Donkey Creek.

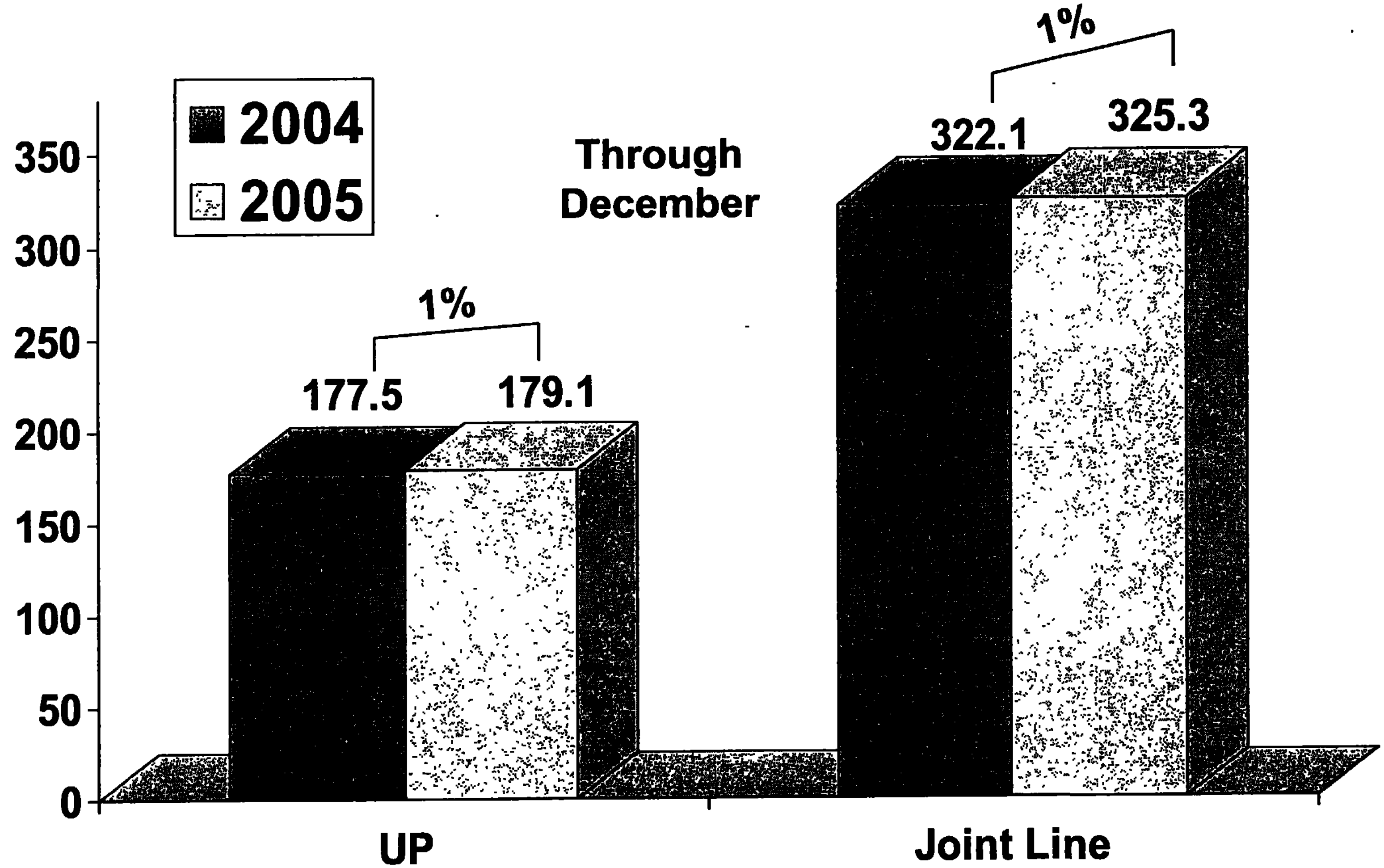
Coal Inventories Up Nationwide
Stocks of subbituminous coal, the type mined in the PRB, were 42.0 percent higher in October 2006 than in October 2005, according to a report issued December 21 by the Energy Information Administration (EIA) of the U.S. Department of Energy. "The October 2006 subbituminous coal stocks were above the annual high levels typically experienced in the spring," EIA said in its Electric Power Flash December Edition.

If you have any questions, please send an email to Customer.Notifications@bnsf.com

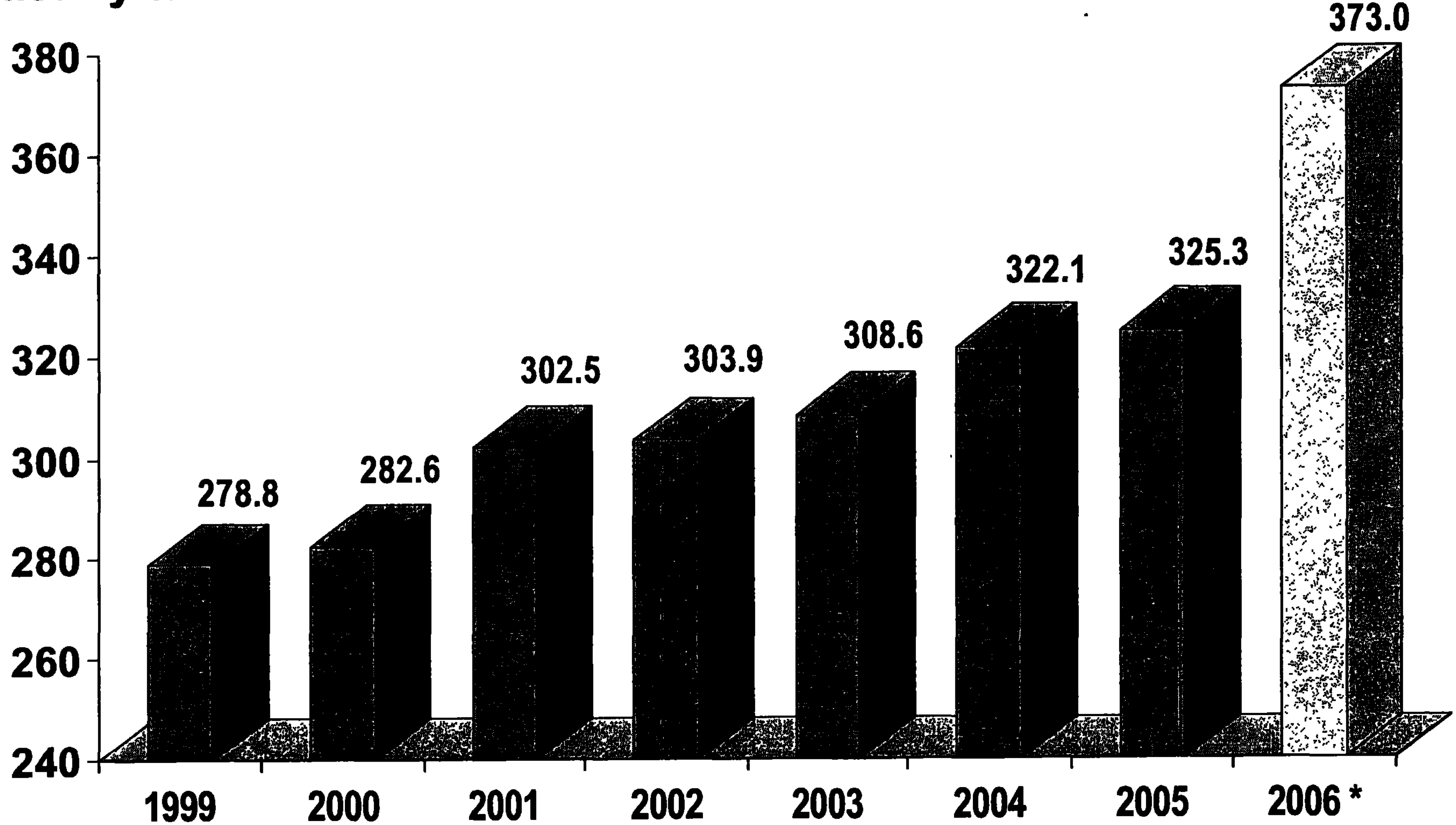
Exhibit G

BUILDING AMERICA®

SPRB Year-to-Date Growth
Tons Loaded in Millions



SPRB Joint Line
History & Forecast



* 2006 Reflects the 1/23/06 Producer Estimate

Exhibit H


NCTA
Logistics & Planning
Committee
Hilton DFW Lakes
Executive Conference Center
Dallas, Texas
February 20, 2008
Andy Schroder
BUILDING AMERICA
UNION PACIFIC

SPRB Year-to-Date Growth

Tons Loaded in Millions

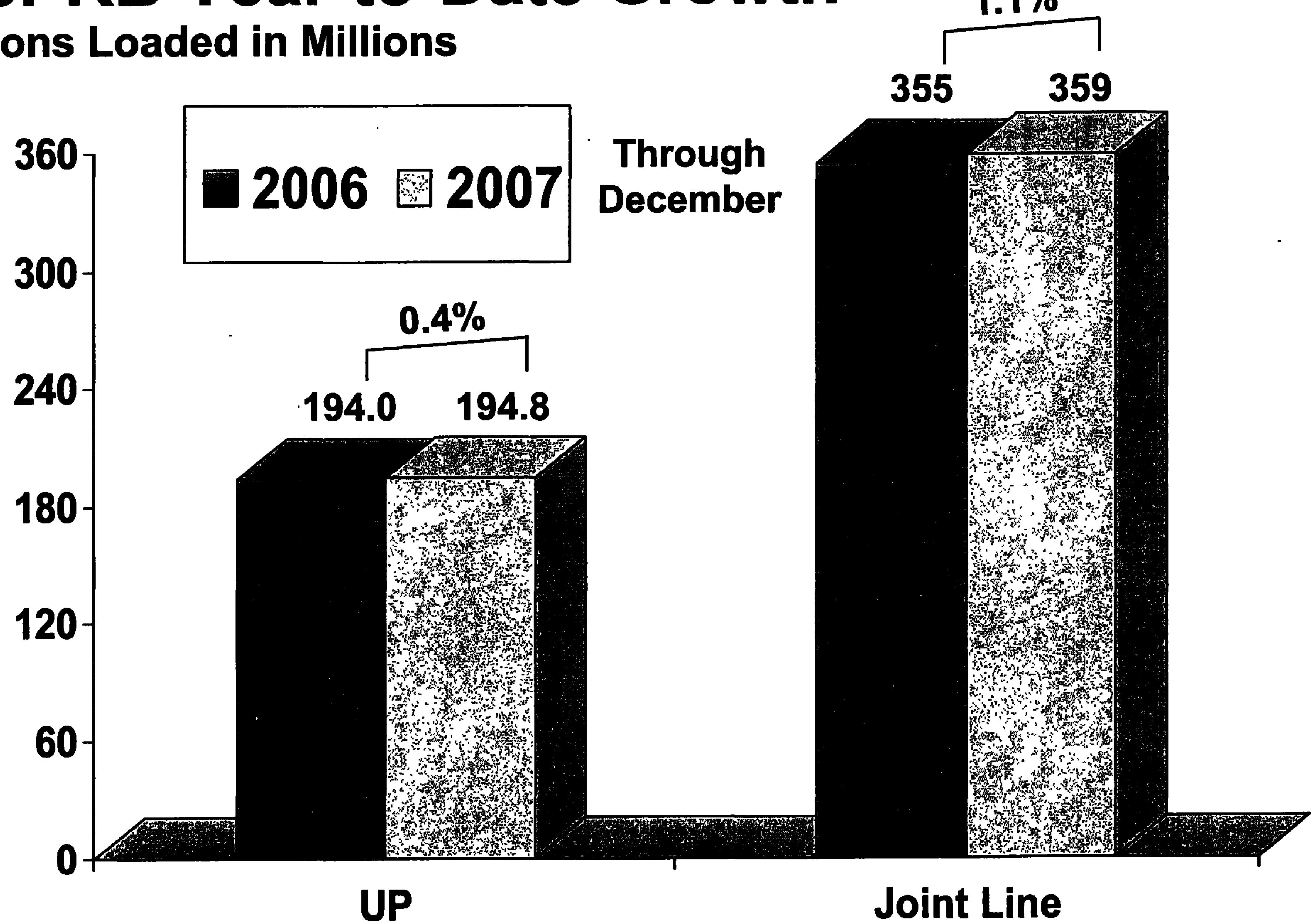


Exhibit I

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF AN INVESTIGATION	)	
INTO ENTERGY ARKANSAS, INC.'S	)	DOCKET NO. 05-116-U
INTERIM REVISION TO ITS ENERGY	)	
COST RECOVERY RIDER	)	

REBUTTAL TESTIMONY

OF

THOMAS D. CROWLEY

PRESIDENT

L. E. PEABODY & ASSOCIATES, INC.

ON BEHALF OF

ENTERGY ARKANSAS, INC.

MARCH 15, 2006

7
1

I. BACKGROUND AND INTRODUCTION

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Thomas D. Crowley. My business address is 1501 Duke Street, Suite 200, Alexandria, VA 22314-3449.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am an economist and President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in fuel procurement, fuel management and fuel transportation matters.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL WORK EXPERIENCE.

A. I have approximately 35 years of experience advising clients, including electric utility companies, on a wide variety of issues, including economic, marketing, transportation, fuel supply and fuel management problems. I have been involved in the negotiation of over 100 coal transportation agreements, as well as provided consultation relating to the administration of economic, operational, and logistical aspects of these agreements. In the course of performing these duties, I have obtained an intimate familiarity with the major western railroads, The BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") (collectively the "Railroads"). This familiarity includes detailed knowledge of railroad operations in the principal coal supply regions they serve, including the

A. Yes. I have advised EAI on certain matters under those Agreements over the years, such as operation of rail rate adjustment procedures, equipment issues, and rail costing analyses. I also served as an expert witness on rail transportation matters and EAI's damages in connection with its litigation against the UP relating to delivery shortfalls in connection with UP's 1997-1998 service crisis related to its merger with the Southern Pacific Railroad. In connection with that function, I also reviewed and advised EAI concerning the current transportation agreement with UP (UP-C-37743), which was a part of the settlement of the service litigation.

Q. WERE THE INCREASED CYCLE TIMES AND SHORTAGE OF RAILCARS DURING MID-2004 AND 2005 DESCRIBED BY MR. MOHL UNIQUE TO EAI?

A. No. Based on my extensive work with PRB coal shippers, I know that nearly all PRB supplied utilities also have been adversely affected by BNSF's and UP's poor service. The Railroads' poor service is a result, in part, of shortages of rail cars, locomotives and crews – which has contributed to the increases in cycle times and under-delivery of declared tonnages for PRB coal shippers. In the course of my work, I have reviewed Federal Energy Regulatory Commission and Securities and Exchange Commission filings, press releases by various utilities and trade press articles that demonstrate that increased cycle times and reduced delivery volumes is a widespread problem for PRB coal burning utilities.

Through these public sources, I am aware of 20 different utilities reporting problems similar to those experienced by EAI. A list of these utilities is attached to my testimony at EAI EXHIBIT TDC-2.

Q. ARE THE TONNAGE SHORTFALLS EXPERIENCED BY EAI UNDER ITS RAIL TRANSPORTATION AGREEMENT UNIQUE?

A. No. As stated above this is an industry wide problem. Of those utilities reporting delivery shortfalls, the amount of the shortfall appears to be similar across all of the utilities, i.e., like EAI, other utilities are receiving only 80 to 85 percent of their declared volumes.

Q. HOW WOULD YOU DESCRIBE THE CAUSE OF THE REDUCTIONS IN DELIVERIES OF POWDER RIVER BASIN COAL BEGINNING IN MAY 2005?

A. The Railroads have cited a number of factors as the cause for the reductions in deliveries of PRB coal. In addition to the causes identified in Mr. Mohl's testimony, i.e., the *force majeure* event relating to the derailment and weather event that caused the fouling of the ballast on a substantial portion of UP's coal route, the Railroads have claimed that the impact of these events was exacerbated by increased demand for PRB coal.